question of whether the benefit runs turn on a decision as to the running of the burden. Such a position is undesirable[15] either in the field of restrictive covenants or of easements and profits. Either in equity or law there are two distinct problems. Each involves the determination of a separable intention and distinct considerations of policy.

The result reached in the principal case is believed to fit well into the general scheme of enforcing restrictive covenants whenever their social expediency is sufficiently demonstrated.[16] No substantial reason was presented for permitting this covenantee to enforce the restriction. The case does not hold that the benefit of a covenant cannot be in gross. There may be some situations where such a covenant would be intended and where it would be desirable. A. N. M.

TORTS

Torts — Duty of Baseball Clubs to Provide for Safety of Patrons — Assumption of Risk

Plaintiff, familiar with baseball and the ball park, attended a game at defendant's park on "Ladies' Day." She obtained a seat for ten cents in the unscreened right pavilion more than one hundred feet from the batter. She could have obtained a seat in the screened grandstand by paying an additional twenty-five cents, as there were empty seats there, but she preferred to sit where she did. She was struck by a foul ball during the game. Held: that defendant was not liable for her injury.[1]

Plaintiff was an invitee of the defendant. It is usually said that an invitor is under a duty to use ordinary care to render the premises reasonably safe for his invitees.[2] In actions against baseball clubs, it is often said that the baseball club has discharged its duty to its invitees if it provides a screened section adequate to take care of the demands of the ordinary number of patrons who will desire that extra protection.[3] So where a foul ball curved around the screen and struck a patron sitting

Stapely, 4 Ohio N.P. (N.S.) 65, 17 Ohio Dec. (N.P.) 1, reversed by circuit court in 4 Ohio N.P. (N.S.) 73, which was reversed without opinion in 74 Ohio St. 461, 78 N.E. 1120 (1906).

[15] S. E. Clark, *op. cit.*, p. 80 *et seq.* and authorities there collected.

[16] In determining the validity of a covenant "inquiry should be made concerning the purpose of the same, the object, design, and reasonableness thereof." *Dixon* v. *Van Sweringen Co.*, 121 Ohio St. 56, 60, 166 N.E. 887 (1929).

[1] *Ivory* v. *Cincinnati Baseball Club Co.*, 62 Ohio App. 514 (1940).

[2] *Harriman* v. *Pittsburgh, etc., Ry. Co.*, 45 Ohio St. 11, 12 N.E. 451 (1887); *Flynn* v. *Central Rr. Co. of New Jersey*, 142 N.Y. 439, 37 N.E. 514 (1894).

[3] *Crane* v. *Kansas City Baseball & Exhibition Co.*, 168 Mo. App. 301, 153 S.W. 1076, 22 A.L.R. 633 (1913); *Cates* v. *Cincinnati Exhibition Co., et al.*, 215 N.C. 64, 1 S.E. (2d) 131 (1939).

behind it, the ball club was not liable since it was held to have exercised reasonable care and was not an insurer against such "remarkable feats."[4] This case may be contrasted with *Olds* v. *St. Louis National Baseball Club*,[5] where the ball club was held liable for failng to provide a protected means of exit from the screened section whereby plaintiff was struck by a ball while leaving the park during the game, on the basis that the club had held out as an adequate plan of protection for the patron one which was not adequate. The ball club is liable under the inadequate plan (inadequate maintenance here) theory if the screen has been allowed to become so worn that balls can easily get through it.[6]

If a patron has the opportunity of sitting behind the screen but doesn't choose to do so, the ball club is not liable if he is hit during the game.[7] The same rule was applied to a patron who was looking for a seat in an unscreened section during batting practice.[8] But where a patron was hit during practice between the two games of a double header by a ball being used in foul territory within twenty-five feet of her, an inferior Ohio court held the ball club liable.[9]

If the screened section is full, the ball club is not liable to a patron, hit by a ball, who was sitting in an unscreened section, provided there was an unusual crowd present at that game.[10] In the principal case plaintiff could have secured a seat behind the screen only by paying an additional sum, but the court does not seem to regard this as material. The plaintiff's announced preference for the unscreened section supports the court's construction.

THE RESTATEMENT OF TORTS, § 343, says that a land-owner is liable to business visitors if he knows or should know of a danger which involves unreasonable risk to them and if he has no reason to believe they will discover the danger or realize the risk. But baseball is a well known game, involving the batting and throwing of a ball in the air as well as on the ground. The danger of the ball being thrown or hit outside the playing field is known to all who are familiar with the game, and plaintiff had testified that she was well acquainted with the game and had enjoyed it for twelve years. So it may reasonably be said that the plain-

[4] *Curtis* v. *Portland Baseball Club*, 130 Ore. 93, 279 Pac. 277 (1929).

[5] 104 S.W. (2d) 746 (1937).

[6] *Edling* v. *Kansas City Baseball & Exhibition Co.*, 181 Mo. App. 327, 168 S.W. 908, 22, A.L.R. 633 (1914).

[7] *Crane* case, note 3, *supra*; *Kavafian* v. *Seattle Baseball Club Ass'n*, 105 Wash. 219, 181 Pac. 679, 22 A.L.R. 634 (1919).

[8] *Loring* v. *New Orleans Baseball & Amusement Co.*, 16 La. App. 95, 133 So. 408, 98 A.L.R., 565 (1931).

[9] *Cincinnati Baseball Club Co.* v. *Eno*, 112 Ohio St. 175, 147 N.E. 86 (1925).

[10] *Brisson* v. *Minneapolis Baseball & Athletic Ass'n*, 185 Minn. 507, 240 N.W. 903, 98 A.L.R. 565 (1932); *Quinn* v. *Recreation Park Ass'n*, Cal. App., 35 P. (2d) 602, 98 A.L.R. 565 (1934).

tiff recognized the ordinary risks of the game and that by electing to sit in the unscreened section she assumed these risks. But in the *Eno* case[11] the plaintiff was held not to assume the risk of being hit when practice was being held between games by several groups of plays at the same time, some of them being in close proximity to the stands, because she couldn't watch all the balls at once.

A distinction has recently been drawn between baseball and hockey. The latter game is not so well understood. The puck is supposed to be played on the ice and the danger of it being driven through the air is not so apparent, at least to the average spectator. It has been held that a patron may rely upon the duty of the management to furnish seats that are reasonably safe for the intended use and that a spectator, at least in the absence of actual knowledge of the dangers of the game, does not assume the risk of being hit by the puck.[12] On the other hand, the greater general understanding of the national game, the greater area that would have to be fenced if everything around the playing field was to be protected, and the recognized preference of the majority of "fans" for the unscreened sections all combine to support the view that the defendant's duty is satisfied if it furnishes a protected place to which those who wish security from the risks of the game may resort.

R. L. B.

Negligence — Duty of Landlord to Persons on and off the Premises

The plaintiff was struck and injured by falling glass, while walking on the sidewalk of a busy thoroughfare. A worn sash cord, supporting the upper sash of a sixth floor window in the building she was passing, had, by reason of wear, given way. The sash dropped to the sill, shattering its pane of glass and causing fragments thereof to fall to the sidewalk, where one of them struck the plaintiff on the head. When the accident occurred and for some two years prior thereto, the building was owned by the defendant and occupied by a tenant under a printed form lease in which was inserted in typewriting the following covenants: "The lessor shall keep the outside of said building in good repair, and the lessee shall make all inside repairs, and for that purpose all window glass shall be considered as inside." In reversing the Court of Appeals for Hamilton County, the Supreme Court of Ohio upheld the plaintiff's right to recover from the defendant owner for negligence in failing to keep the premises in repair, in accordance with his covenant.[1]

[11] Note 9, *supra*.

[12] *Shanney* v. *Boston Madison Square Garden Corp.* — Mass. —, 5 N.E. (2d) 1 (1936); *James* v. *Rhode Island Auditorium, Inc.*, — R.I. —, 199 Atl. 293 (1938).

[1] *Friedl* v. *Lackman*, 136 Ohio St. 110, 23 N.E. (2d) 950 (1939).